V. TELRIC PRINCIPLES MUST APPLY TO ALL INTERCONNECTION RATES AND COLLOCATION

Interconnection and Access Rates. The Commission must reject the Bells' proposals to use different cost standards for interconnection rates. BellSouth at 54-55; Verizon at 55-57. As the Commission held in the *Local Competition Order* (¶ 1056) and reaffirms in the *Notice* (¶ 147), the Act requires that rates for UNEs and interconnection be based on the same cost-based standard. The Commission thus lacks authority under the Act to adopt a different pricing standard for interconnection and UNEs.

In any event, the incumbents' proposals are unsound. BellSouth concedes that charging different rates for different types of traffic would be extremely difficult to implement, because it would require allocating the cost of the same UNE line based on the type of traffic carried over that line. BellSouth at 54-55. And even if such a "separations" scheme were feasible, it would be bad public policy. CLECs have no ability to enter local markets and compete with ILECs unless their customers have the ability to call customers of the ILECs. Willig Decl. ¶ 149. Thus, for the same reasons that ILECs have strong incentives to deny CLECs the right to interconnect with their customers, so do they have strong incentive to charge excessive rates for such interconnection. To ensure a level playing field, it is thus critical that the rates incumbents charge to other carriers for interconnection, including exchange access and local intercarrier compensation, mirror the incumbent's forward-looking economic costs of those services. *Id.*

Relatedly, in its initial comments, AT&T also explained (at 122-23) why there is no legitimate economic basis for pricing access differently than UNEs. To ensure a level competitive playing field, it is critical that the rates incumbents charge to other carriers for interconnection, including exchange access and local intercarrier compensation, mirror the incumbent's forward-looking economic costs of those services. The Bells simply ignore this critical issue.

Collocation. The Commission also should reject BellSouth's proposal to implement "per fuse" amp rates for DC Power provided to collocation space. BellSouth at 55-57. As demonstrated by AT&T (Comments at 123; Klick Decl. ¶¶ 131-39), if incumbents are permitted to charge for DC Power on a per fuse amp basis, then collocation customers will be charged for power that they neither order, nor consume in cases where the incumbent rates per fused amp are based on their cost per actually drained amp. BellSouth does not address that issue, but complains instead that charging collocation customers for the power that they actually consume would be inconvenient because it would require BellSouth to install power meters. But the fact that BellSouth has chosen not to install power meters along with the substantial amount of other power equipment it installs to provide DC Power is not a basis for charging collocation customers for power they do not consume.

VI. RESALE PRICING

The Commission should reject the Bells' proposals to include in wholesale rates marketing and other retail costs incurred by incumbents to compete against CLECs. *See* BellSouth at 51-52; Verizon at 100-101, 104. The incumbents' claim, for example, that wholesale competitors should pay for the incumbents' cost of "educat[ing] customers on [the services] uses." BellSouth at 51; Verizon at 102. But those are exactly the types of marketing services that the incumbent avoids when a CLEC serves the customer, as it is the CLEC that "educates customers." The "education" offered by the ILECs is nothing more than marketing of its own services against the competitor – the paradigm of the type of cost that should not be paid by CLECs in wholesale rates.[64]

BellSouth's *ipse dixit* that incumbents "avoid" no "billing and collection costs when acting as a wholesaler" likewise does not withstand scrutiny. BellSouth at 52. As Verizon frankly concedes "[t]he *retail* billing costs would be avoided, but the wholesale billing cost obviously would not." Verizon at 103. Accordingly, wholesale rates should not reflect any of the billing costs associated with retail customers. Further, "collection" costs for wholesale customers are much lower than those for retail customers. There are far fewer wholesale

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[64] The Bells now compete against CLECs in numerous lines of business, including residential and business voice and data services and the costs of marketing those services are recovered in existing retail rates. Selwyn Decl. ¶¶ 66-67. To ensure that competitors do not subsidize the incumbents' cost of competing against them – which plainly would place them at a severe competitive disadvantage – it critical that wholesale rates do not include such marketing and retailing costs. *Id.* Moreover, removing such costs from retail rates is consistent with the Act's requirement that wholesale rates "exclud[e]" any "marketing" costs and the Eighth Circuit's requirement that such costs be removed if they "will be avoided." 47 U.S.C. § 252(d)(3); *Iowa Utils. Bd. II*, 219 F.3d at 755. The marketing and other retail expenses incurred by incumbents to obtain and retain retail customers is completely unnecessary to obtain and retain wholesale customers, Selwyn Decl. ¶¶ 65-67, and is an "avoided" cost within the meaning of section 252(d)(3).

customers and, moreover, wholesale customers are much less likely to disappear, as retail customers can do by moving to another state, or refuse to pay bills.[65]

[65] The Commission already has rejected BellSouth's claim that costs recorded in Accounts 6621 and 6622 should be included in wholesale rates and BellSouth provides no reason here for the Commission to revisit that conclusion. *Local Competition Order* ¶ 917 ("All costs recorded in accounts 6621 (call completion services) and 6622 (number services) are also presumed avoidable, because resellers have stated they will either provide these services themselves or contract for them separately from the LEC or from third parties").

VII. IMPLEMENTATION ISSUES

A. The Commission Should Issue New Competitively-Neutral Rules To Streamline State Commission Pricing Proceedings.

There is no dispute that there is a massive information asymmetry between the ILECs and all other parties, including the state commissions. Willig Reply Decl. ¶ 106. And Bells consistently refuse to make available some of the most basic data that only they have and that are essential to estimate forward-looking costs. Klick Decl. ¶¶ 45-74 (listing examples) Murray/Pitts Decl. ¶¶ 19-22 (refusal to provide fundamental switching data). To avoid such information asymmetry, the Commission should develop a list of data to which the incumbents have unique access, and to which access in necessary to set UNE prices. The Commission should then adopt a rule requiring incumbents to make all data on that list available to parties and the state commission in UNE pricing proceedings. *Accord* Verizon at 106-107 (supporting data disclosure requirements).

In this regard, the Commission should make clear that proprietary data produced in one state proceeding is presumed portable to all states in the region, again subject to an appropriate protective order. There is simply no legitimate basis for an incumbent to withhold from one state commission data that it made available to another state commission. Such a requirement will substantially reduce the cost of litigation by eliminating discovery battles that already have been resolved in one state. It also would increase consistent findings by state commission's by ensuring that each state commission has available to it the information that was made available to other state commissions.

On the other hand, the proposals sponsored by the Bells are designed merely to limit access to relevant data and harass CLECs. For example, Verizon proposes to limit discovery, and to make discovery available only after cost studies have been filed. Verizon at 108-109. It is impossible to predict *a priori* all of the information that will be required in any particular UNE rate proceeding, and whether the incumbent will provide all such necessary data. In this regard, to the extent that the baseline data submitted by the incumbent are insufficient to allow other parties to develop their own cost studies, discovery should be permitted before the submission of the cost studies. That is just common sense.[66]

The Bells likewise propose that competitors' cost data must be filed in every state proceeding, but this is clearly a ploy simply designed to drive up the costs of litigating UNE cases. *See* Qwest at 62-63; Verizon at 107. As an initial matter, competitors' cost data often have no relevance the forward-looking costs of an efficient UNE provider – indeed, most competitors do not even sell UNEs. And to the extent that state commissions determine that in limited instances, competitors' cost data are required, state commissions can themselves (through the discovery process) obtain that data.

Finally, Qwest's proposal to unilaterally impose new evidentiary standards and shift the burden or proof in state UNE pricing proceedings is contrary to well-established federal court precedent and prior Commission's orders. Qwest at 64. At bottom, it is thinly veiled attempt to eliminate the state commissions' ability to rely on cost studies submitted by competitive carriers, and should be squarely rejected.

It is important to place Qwest's proposals in context. In state UNE rate proceedings, Qwest has repeatedly submitted and relied upon cost studies that violate even the most fundamental TELRIC principles. Qwest's cost studies, for example, routinely are based on embedded network costs with no forward-looking adjustments, and even include retail-only costs in direct violation of the Commission's TELRIC rules. In a recent proceeding in Minnesota, for

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[66] Verizon's proposal that discovery be limited to some set period of two or three months should be rejected as well. *See* Verizon at 109. A two or three month time limit would give ILECs an incentive to withhold cooperation during the discovery period in the hope of running out the clock and avoiding production of critical data.

example, the Public Utilities Commission, after describing the "many defects" in Qwest's loop model, which produced loop costs that were "$75 per line more than Qwest's embedded loop costs," rejected Qwest's cost models. *MN Final Decision* at 18-19. Competitors, on the other hand, have submitted cost studies in state UNE pricing proceedings that faithfully comply with the binding federal pricing rules, and state commission's often have relied on the competitors' cost studies as an alternative to Qwest's non-TELRIC-compliant cost studies. *See, e.g., id.* at 132.

To support their studies, CLECs provide specifications of all of the inputs used in the cost studies as well as the underlying data and methods used to compute those inputs. However, there are a few instances where the underlying data used to compute the inputs cannot be disclosed (even in these circumstances, however, the methods used to compute the inputs are disclosed). The reason for such non-disclosure follows directly from the asymmetric access to information between incumbents and competitors.[67] To overcome this information asymmetry, competitors' cost studies sometimes must rely on surveys of switch vendors and other competitors, wherein the vendors and competitors provide switch pricing data. Of course, carriers do not ordinarily make such cost information available to third parties, especially not to Qwest, their dominant competitor. Vendors also do not ordinarily publicly disclose the prices they charge to Qwest or other carriers for that equipment, because vendors reach individual agreements with each carrier. *Id.* Competitors and vendors thus agree to supply the cost information requested by the surveys on the condition that the individual pricing data be kept confidential. *See id.*. Simply put, by

[67] As one example, to determine xDSL investment—the cost of purchasing and installing switches—the incumbents can turn to vast amounts of data, including their current and future contracts with numerous vendors. Competitors, by contrast, have deployed far fewer, if any, xDSL lines and thus generally lack sufficient data to accurately compute forward-looking switching costs.

agreeing to keep the survey answers confidential, competitors are able to collect sufficient accurate data to estimate forward-looking costs.

Qwest seeks to take anticompetitive advantage of this dilemma and asks the Commission to tie state commission's hands with a new rule precluding state commission's from relying on inputs provided by competitors unless supported by all "documents or information" relevant to those costs. Qwest at 64. To do so would leave state commissions no choice but to rely only on Qwest's non-TELRIC cost studies to compute UNE rates, which inevitably would lead to vastly overstated UNE rates.

Placing such a burden on competitors, even when the competitors are the proponents of a particular cost, is both unreasonable and unnecessary. It is unreasonable because, as noted above, competitors often can obtain the necessary underlying data if the data is not disclosed to third parties. In this regard, placing an affirmative burden on the competitors would, in effect, preclude competitors from proposing costs for entire classes of evidence. It is unnecessary because the incumbents do not need the underlying data for every input to assess the appropriateness of the proposed input. The incumbent, as the monopoly provider, has full access to all relevant information required to assess the accuracy of the cost of any input proposed by a competitor, and thus has the capability to submit evidence in state proceedings regarding the accuracy of a competitor's proposals. And state commissions have the necessary expertise to correctly determine the weight it should place on such inputs.

B. The Comments Confirm That The Commission Should Not Adopt A UNE Adjustment Factor.

There is a consensus that adopting an automatic adjustment factor for UNEs would be unworkable. *See* SBC at 89-90; AT&T at 128-31. For example, an automatic annual rate adjustment would inevitably lead to rates for some UNEs that are not based on the "cost" of the element, as required by the Act. 47 U.S.C. § 252(d)(2). *Accord*, SBC at 89 ("A uniform productivity factor could not possibly reflect the incumbent's real-world costs, because it would by definition be based on predictive assumptions—which would be no less speculative and controversial here than in the price cap context—rather than actual data about the incumbent's network and expenses."). Moreover, no regulatory efficiency will be achieved by adopting an automatic UNE adjustment factor. The adjustment factor would need to be exceedingly complex—taking into account inherent differences between loops and switches, *see* AT&T at 130-31; changes in demand, *id.* at 131; the rapid pace of technological development, SBC at 89; and state-specific differences in UNE costs, AT&T at 131. Under these circumstances, the costs of an adjustment factor clearly outweighs its benefits.

C. The Commission Should Reject The True-up Proposals Advocated By The Bells.

Only Verizon asks that the Commission mandate that the new rates that may emerge from this proceeding must be subject to true up. Verizon at 105. But, as Verizon acknowledges, serious uncertainty may follow the adoption of a true-up mechanism tied to structural changes in the TELRIC rules. *Id.* If the inevitable litigation that follows changes to the TELRIC rules lasts for several years—and if past is prologue, it will—the actual costs of competitive entry would fall into limbo, creating a long-term barrier to entry. For this reason, it is no answer to these concerns that state commissions and CLECs are on notice that the TELRIC rules may change. *See id.* All that means is that a true-up mechanism may not be unlawful. It does not mean that it is a good idea in these circumstances. As noted, a true-mechanism in this case would create substantial uncertainty about what entry costs are for an indefinite period of time, which obviously would discourage competitive entry. Rather, the Commission should rely instead on the professionalism of the state commissions and their commitment to reflect the Commission's new rules as quickly as practicable.

This of course, does not mean that true-up mechanisms are always inappropriate, and the Commission should confirm that state commissions retain authority to issue true-ups where appropriate – such as in the case of "interim" rates or UNE rates that have gone into effect despite a tentative finding that they are too high. The Commission should, therefore, reject Qwest's proposal to arbitrarily limit that authority. Qwest at 76. Again, Qwest is using this proceeding as a vehicle to collaterally attack state commission proceedings where it has no prospects of success in federal court. Indeed, in this case, Qwest's proposal is not based on any legal or legitimate policy reasons, but is intended solely to allow Qwest to avoid $13 million in true-ups owed to competitors in Minnesota.

Specifically, Qwest proposes that the Commission "declare that rates approved by a state commission under the governing methodology at the time of their adoption are not subject to true-up unless: (1) the state commission finds that a party engaged in misconduct that (a) affected the outcome of the proceeding during which the rates were first determined and adopted; or (b) delayed the adoption, and hence the prospective application, of revised rates, or (2) the results of the original proceeding are vacated by a federal court." Qwest at 76. But the Commission has already determined that a true-up is appropriate in precisely the situations where Qwest's rule would forbid it. Whenever the Commission's own Wireline Competition Bureau is called upon to arbitrate UNE rates for interconnection agreements, the Commission not only permits, but *requires*, the use of interim rates subject to true-up. *Section 252(e)(5) Order* ¶ 10. Federal courts also permit for true-up in circumstances beyond the narrow range proposed by Qwest. *AT&T Corp. v. FCC*, 220 F.3d 607, 118, 620-21 (D.C. Cir. 2000) (finding consistent with the 1996 Act the Commission's approval of the New York commission's use of interim rates subject to true-up); *see also, e.g., Texas 271 Order* ¶ 88 ("endorsing the use of "interim rates . . . so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to [TELRIC], and provision is made for refunds or true-ups once permanent rates are set"); *California 271 Order* ¶ 37; *New York 271 Order* ¶ 259.

Qwest attempts to justify its proposed rule on the grounds that true-ups under circumstances outside those circumscribed by Qwest would constitute unlawful retroactive ratemaking. But the rule against retroactive ratemaking states only, as a general matter, that agencies are prohibited from changing rates retroactively (*i.e.*, for transactions already completed) to protect the settled expectations of entities that are entitled reasonably to rely on rates that do not appear to be subject to change. *See generally Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-75 (D.C. Cir. 1992).

Thus, in circumstances where all parties are aware that rates are subject to true-up, there can be no claim that the true-up mechanism constitutes unlawful retroactive ratemaking. As explained by the D.C. Circuit, "the rule against retroactive ratemaking . . . does not extend to cases in which [the parties] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (reversing agency for *not* making effective date of new valuation method retroactive); *see also id.* ("The goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed"). The Court has further explained that "[a]bsent detrimental and reasonable reliance, anything short of full retroactivity ... allows [some parties] to keep some unlawful overcharges without any justification at all." *Public Service Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (1996).

D. The Commission Should Reject The Proposals That Would Require States To Ignore Commission Application Of TELRIC Principles.

The Commission also should decline Qwest's invitation to "state, unequivocally and without qualification, that its resolution of issues in its USF proceeding may not be relied upon in determining UNE rates." Qwest at 66. There simply is no legitimate basis for state commission to ignore the Commission's application of forward-looking economic principles in the universal service context.

Specifically, as explained by the Commission, the cost model and inputs for its universal service program are based on "forward-looking costs," *Inputs Order* ¶ 22, which the Commission has defined to mean TELRIC-compliant costs, *Local Competition Order* ¶ 684. To be sure, because the Commission's universal service mechanism is designed to measure the cost differences *between* states and not the precise costs in any particular state, the universal service cost model is based on nationwide input values and does not compute the costs for individual unbundled network elements for any particular state. The Commission therefore has explained that "State commissions . . . may find that it is not appropriate to use nationwide values in determining state universal service support or prices for unbundled network elements and may choose instead to use statewide or company-specific[] values." *Inputs Order* ¶ 31 n.66. And it is these concerns that prompted the Commission to state that "[t]he federal cost model was developed for the purpose of determining federal universal service support, and it may not be appropriate to use nationwide values for other purposes, such as determining prices for unbundled network elements." *Inputs Order* ¶ 32. Thus, contrary to Qwest's claims, the Commission was clearly not holding that state commissions should ignore determinations made by the Commission in the universal service context with regard to basic methodological issues or holding that the input values it found appropriate for determining "national" forward-looking values were necessarily irrelevant to the determination of state-specific UNE costs.

CONCLUSION

For the foregoing reasons, and the reasons set out in AT&T initial comments, the Commission should clarify the TELRIC rules only in a manner consistent with the discussion above and the discussion in AT&T's initial comments.

Respectfully submitted,

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January 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2004, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: January 30, 2004
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/s/ Yetunde E. Afolabi

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